

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 1, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP1927**

**Cir. Ct. No. 2011CV5016**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**NNM FUNDING GROUP, LLC,**

**PLAINTIFF-RESPONDENT,**

**V.**

**NNM MANAGEMENT GROUP, INC.,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Dane County:  
MARYANN SUMI, Judge. *Affirmed.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. NNM Management Group, Inc. (“Management”) appeals an order granting the motion of NNM Funding Group, LLC (“Funding”) for judgment on the pleadings, requiring Management to transfer its Class A units to Funding for zero dollars, and dismissing Management’s counterclaim. The court upheld an appraiser’s valuation of the Class A units at zero dollars.

Management argues that judgment on the pleadings was inappropriate because it pled sufficient facts to state a claim challenging the validity of the appraisal based upon Funding's alleged bad faith for supplying inaccurate and misleading information to the appraiser. We affirm the order because we conclude that the counterclaim fails to allege sufficient facts to challenge the appraisal.<sup>1</sup>

### **BACKGROUND**

¶2 Management and Funding each owned Class A units of Hot Shots Nuclear Medicine LLC. They entered into a contract requiring Management to sell its Class A units to Funding at a price to be determined by a qualified, independent appraiser. The parties selected an appraiser, which, using information supplied by Funding, valued the Class A shares at zero dollars. Management disagreed with the evaluation and refused to transfer ownership of the units.

¶3 Funding commenced the present action, requesting a declaratory judgment and an order requiring Management to transfer ownership of the units for zero dollars. Management filed a counterclaim, seeking to set aside the appraisal, arguing that Funding provided false and misleading information to the appraiser, which constitutes fraud, bad faith, and breach of the agreement's implied covenant of good faith and fair dealing. The circuit court held that Management did not plead fraud with sufficient particularity and allowed Management to amend its counterclaim. When Management did not submit an

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<sup>1</sup> Because we conclude that Management's counterclaim failed to state a claim upon which relief could be granted, we need not address other issues raised on appeal, specifically, whether there is a heightened pleading requirement for allegations of bad faith, whether separating a breach of contract claim from a bad faith claim is required for purposes of pleading, or whether a bad faith claim is cognizable to challenge the validity of an appraisal outside of an insurance context.

amended counterclaim, the court granted Funding’s motion for judgment on the pleadings and dismissed Management’s counterclaim.

### DISCUSSION

¶4 We review a judgment on the pleadings without deference to the circuit court. *Freedom from Religion Foundation, Inc. v. Thompson*, 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Ct. App. 1991). To determine whether judgment on the pleadings is appropriate, we employ the first two steps of summary judgment methodology. *Id.* That is, we first determine whether the complaint or counterclaim states a claim. If it does, we determine whether the answer shows that a material factual dispute exists. *Id.*

¶5 In *Farmer’s Auto Ins. Ass’n v. Union Pac. Ry. Co.*, 2009 WI 73, ¶¶42-45, 319 Wis. 2d 52, 768 N.W.2d 596, our supreme court explained that appraisal awards contracted to by the parties are “presumptively valid,” and therefore judicial review of challenges to such appraisals “should usually be limited to the face of the award.” However, the court further explained, if it is “reasonably implicated” that an appraiser’s work was flawed due to “fraud, bad faith, material mistake, or a lack of understanding of the process,” then it is “within a judge’s discretion to allow further inquiry or discovery,” bearing in mind that courts “must not substitute their judgment for that of the appraisers.” *Id.*, ¶45.

¶6 Here, Management’s counterclaim shows no defect on the face of the appraisal. Indeed, the appraisal itself was not attached to the pleadings and is not a part of the record on appeal, making it impossible to establish facial invalidity. The mere allegation of “recent positive performance of Hot Shots” does not, by itself, establish facial invalidity of the appraisal. Further, Management does not allege sufficient facts to support a claim of fraud, bad faith,

material mistake, or a lack of an understanding of the process. For example, the counterclaim does not identify any specific incorrect fact that Funding supplied to the appraiser. It also does not identify the appraiser's method, which would be necessary to establish the significance of any misrepresented fact.

¶7 Accordingly, we conclude that Management's counterclaim fails to allege sufficient facts to challenge the appraisal.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

